IN THE CIRCUIT COURT OF COOK COUNTY
CHANCERY DIVISION

Judge Jean Prendergast Rooney

MAY 29 2014
Circuit Court – 2044

Garry McCarthy, Superintendent of Police of the City of Chicago,
Plaintiff,

v.

Bruce Askew; The Police Board of the City of Chicago,
Defendants.

Case No. 12-CH-23464

Calendar 8
Judge Jean Prendergast Rooney

ORDER AND OPINION

This petition for administrative review has arisen after charges brought by the Superintendent of Police Gary McCarthy ("Superintendent") alleging excessive use of force against Respondent Bruce Askew ("Askew"). These charges were dismissed as untimely under a five-year statute of limitations as set out in the Illinois Municipal Code at 65 ILCS 5/10-1-18.1. The Superintendent brought this petition for administrative review maintaining that the hearing officer should have applied section 6.1(D) of the Collective Bargaining Agreement ("CBA") between the City of Chicago ("City") and the Fraternal Order of Police ("FOP"). The Superintendent argues that section 6.1(D) of the CBA allows actions to be brought after the five-year limitations period if the Superintendent authorizes the lawsuit. This petition for administrative review presents a novel question: whether the City can set a statute of limitations on charges against police officer's for use of excessive force that differs from limitations period created by the Illinois General Assembly.

By way of background, Askew was charged on formally November 1, 2011. The charges claim that on October 7, 2006, Askew and another officer responded to a reported fight at 6408 South Marshfield Avenue in Chicago. Askew allegedly struck Greg Larkin on the head and body with his baton and caused injuries requiring stitches and staples.

Askew filed a motion to strike and dismiss the charges because: (1) they were barred by the statute of limitations; (2) barred by the doctrine of laches; and (3) the police failed to follow its own general orders and procedures to prosecute Askew. The parties submitted additional briefs at the request of the hearing officer on three questions:

(1) What is the applicability and effect of 65 ILCS 5/10-1-18.2 of the municipal code? Does section 18.1 apply to the City of Chicago?
(2) If Chicago's home rule powers in this area are preempted by section 18.2, does state law (e.g. 5 ILCS 351/15 or any predecessor) require that the collective bargaining agreement nonetheless prevail over 65 ILCS 5/10-1-18.1 if there is a conflict between the two?

(3) Is there a conflict between sections 65 ILCS 5/10-1-18.1 and section 6.1(D) of the collective bargaining agreement?

The Board held that (1) the State legislature had adopted a mandatory rule that cannot be changed by a city's exercise of its home rule power setting the statute of limitations on charges of excessive force and (2) in any event, there was no conflict between section 18.1 and the CBA. The Board relied upon section 15(b) of the Illinois Public Labor Relations Act (5 ILCS 315/15) and reasoned that the CBA would supersede any conflicting statutes adopted by the *employer*. In this case, however, section 10-1-18.1 was enacted by the *state*, not the employer. The Board further reasoned that section 15(b) is designed to prevent the City from negotiating an agreement with a union, and then later revoking an undesirable provision of that agreement by enacting a conflicting ordinance.

Ultimately, the Board held the CBA did not trump the five-year statute of limitations in 65 ILCS 5/10-1-18.1. Further, the Board held there was no conflict between the CBA and section 18.1 here because the CBA at section 6.1(D) related only to the ability to investigate, where as the statute of limitations in section 18.1 limited the right to bring charges.

The Superintendent filed his Complaint for Administrative Review in this court. Where a question of law is at issue, as it is here, the court's standard of review is *de novo*. *Branson v. Dep't of Revenue*, 168 Ill. 2d 247, 254 (1995). Under this standard, little or no deference is afforded the decision maker's ruling. *Id.*

The legal question is whether the Board properly dismissed the charges of excessive force as untimely under 65 ILCS 5/10-1-18.1. Stated differently, the issue is whether statute of limitations in section 18.1 for charges of excessive force apply to the City of Chicago as a home rule unit that has adopted its own personnel administration system and has negotiated a CBA pursuant to its duty under the Public Labor Relations Act.

The duty of public employers, including the City of Chicago, to bargain collectively with the designated exclusive bargaining representative is clearly set out in section 7 of the Illinois Labor Relations Act and well established in case law. See e.g., *City of Decatur v. AFSCME*, 122 Ill. 2d 353, 356 (1988) (the Act imposes duty of public employer to bargain collectively with the designated exclusive bargaining representative). Where the duty to bargain exists, "the parties certainly must be obligated to follow the provisions of an agreement established through the collective-bargaining process". *Health Employees Labor Program of Metropolitan Chicago v. County of Cook*, 236 Ill. App. 3d 93, 96(1st Dist. 1992). Nevertheless, the duty is not limitless, as it extends only to matters "not specifically provided for in any other law or not specifically in violation of the provisions of any law." *Id.*

("bargaining duty may in fact be limited by a law that specifically provides for, or prohibits, a matter that would otherwise be a mandatory subject of bargaining").

The Superintendent argues the City and FOP negotiated a longer statute of limitations period in the CBA, which supersedes the statute of limitations found in 10-1-18.1. The Superintendent reasons that under the Labor Relations Act, the CBA supersedes any contrary rules adopted by the public employer. He argues the City did not adopt Article 10, Division 1, but instead adopted its own personnel code in 1976, 1981 and 1990 under its home rule power. The Superintendent maintains that the City adopted section 10-1-18.1 before the state legislature amended it in 1992 to include the statute of limitations and added the home rule preemption in section 18.2. He also argues the City bargained for the CBA with the FOP in response to those amendments by adding section 6.1(D) in the 1995-1999 agreement. He argues: (1) section 10-1-18.1 was purely optional for the City; (2) the City does not operate pursuant to Article 10, Division 1; (3) the City's incorporation of section 18.1 into MCC Section 2-74-130 does not imply that the City is a Division 1 entity and (4) section 18.2 has no force on the City. The Superintendent argues that the City is only bound by section 18.1 to the extent that the City opted into it and that the City is free to amend section 18.1 as it wishes. The Superintendent maintains that a home rule unit that enters into a collective bargaining agreement is bound by the agreement. Finally, the Superintendent argues that public policy favors allowing him to bring allegations of excessive force that are more than five years old because excessive force damages the public's trust in the police and public policy favors collective bargaining for public employees.

In response, Askew argues that sections 18.1 and 18.2 apply directly to the City of Chicago. He argues that section 18.2 makes clear that the City cannot opt out of or bargain away section 18.1 and the City cannot modify the statute of limitations merely because it is a home rule municipality. He argues that section 18.2 specifically preempted section 18.1 from regulation by home rule municipalities. Askew further argues that section 18.1 and section 6.1(D) of the CBA do not conflict because section 6.1(D) concerns the question of when an investigation of misconduct may be initiated; whereas section 18.1 concerns the time frame during which charges must be brought. He maintains the five-year statute of limitations for unreasonable force charges does not affect the Superintendent's ability to investigate allegations, file charges, or discipline in matters not related to unreasonable force. Finally, Askew argues that, as the Board held, the Labor Relations Act does not compel the outcome sought by the City, because: (1) the City is barred under 5 ILCS 315/7 from bargaining over matters that are covered by a mandatory statute; (2) 5 ILCS 315/15(a) states that the Labor Relations Act or the CBA will prevail in the event there is a conflict between the Act and State law, which is not the case here; and (3) 5/ ILCS 315/15(b) states the CBA will prevail when a contrary rule is adopted by the employer, which again is not the case here.

The Superintendent argues that the City rejected the statute of limitations found in section 18.1 by negotiating a longer statute of limitations period in the CBA. Askew essentially argues that section 6.1(D) of the CBA says nothing about the statute of limitations on bringing charges of excessive force against a police officer. The Board held, and Askew here argues, that there is no conflict between section 18.1 and section 6.1(D) of the CBA because section 18.1 relates to the statute of limitations for bringing *charges* while CBA 6.1(D) concerns the question of when an *investigation* may be initiated.

The court is required to give the provisions at issue are given their plain and ordinary meaning. *Van's Material Co. v. Dep't of Revenue*, 131 Ill. 2d 196, 202 (1989). Here, the CBA at section 6.1(D) states that no complaint or allegation of misconduct that occurred more than five years prior to the complaint shall be the subject of a "Complaint Register investigation" or be reopened or reinvestigated after five years from the date an investigation was opened unless the Superintendent authorizes it. Section 18.1, on the other hand, address the initiation and filing of charges. "Investigation" and "charges" are two separate concepts. For example, an investigation could be opened without charges ever being brought.

As such, section 18.1 and the CBA are not in conflict. Thus, the City's argument that it rejected the statute of limitations set out in section 18.1 and negotiated a longer statute of limitations is unpersuasive. Thus, the Superintendent's petition must be denied.

Even if a conflict existed, the City did not have the authority to create its own statute of limitations period. The Superintendent argues that the City was not bound by section 18.1 or the preemption provisions in section 18.2 because it was free to, and in fact had a duty under the Public Labor Relations Act, to negotiate its own terms under a CBA. The Superintendent's position is that while the wording of section 18.2 takes the statute of limitations on charges of excessive force off the bargaining table in certain instances, sections 18.1 and 18.2 are only optional to the City of Chicago, not mandatory. Thus, the Superintendent asserts that the provisions do not limit the City's ability to bargain for a limitations longer period.

The weakness with the City's position is the express language found in section 18.2, which explicitly preempts the home rule powers of a municipality. This preemption power asserted by the state legislature in section 18.2 is derived from the Illinois Constitution. Section 18.2 states the statute of limitations set out in section 18.1 is "an exclusive exercise of powers and functions by the State under paragraph (h) of Section 6 of the Illinois Constitution." This express preemption language takes the statute out of the "myriad of State statutes and local ordinances pertaining to matters of public employment" referred to in *City of Decatur* and

brings the statute within a narrow body of law envisioned by the court in *Town of Cicero* that expressly limits home rule powers.

Thus, even if the City could opt out of other parts of Article 10, Division 1, it cannot circumvent the State's exclusive exercise of powers and functions in section 18.1. For similar reasons, the Superintendent cannot rely on the section 15 of the Public Labor Relations Act, because the express preemption language and the exclusive power of the state found in section 18.2 is not simply an Act that conflicts with the Public Labor Relations Act. The City therefore could not bargain away the preemptive effect of sections 18.1 and 18.2 and the Superintendent's petition for administrative review must be denied.

IT IS HEREBY ORDERED:

The Superintendent's petition for administrative review is denied and the Board's decision is affirmed.

ENTERED: May 29, 2014

Judge Jean Prendergast Rooney
MAY 29 2014
Circuit Court – 2044

JUDGE JEAN PRENDERGAST ROONEY